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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 9 and 16

NACIREMA OPERATING COMPANY, INC. AND LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners,

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY,
Respondents.

JOHN P. TRAYNOR AND JERRY C. OOSTING, DEPUTY COMMISSIONERS,
Petitioners,

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY,
Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS WILLIAM H. JOHNSON and JULIA T. KLOSEK

Developments Since Cases Were Argued

Following the argument of these consolidated cases on March 25, 1969, there have been some developments the parties deem of sufficient importance to bring to the atten-

tion of the court. In their Supplemental Brief the Petitioners cited *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, which will be commented on at the end of this section of our Brief.

Recently, a very scholarly law review article was published in Volume 3 of the Georgia Law Review, captioned "Dockside Injuries Under the Longshoremen's and Harbor Worker's Compensation Act". The exhaustive treatment runs from page 622 to 642 and is documented with 122 footnotes. Although the article is uniformly excellent, the Court's attention is particularly directed to subcaptions II. "The Act and Its Legislative History", pp. 622-629, and IV. "Modern Approaches to the Act's Jurisdiction", pp. 635-640.

Its appraisal of the legislative history of the Act is contained in this sentence:

> "Although it should be clear that purely onshore injuries are excluded from compensation under the Act, a careful reading of the **legislative history casts doubt** on the traditional judicial view that *pierside injuries to maritime workers* who must continually **pass between pier and vessels** were also intended to fall **outside the purview** of the Act" (p. 625).

The final paragraph of the article reads:

> "Despite lack of express Congressional recognition of compensation for dockside injuries, continued judicial **adherence to** the **rigid situs theory** is in itself **inconsistent with** the **basic purposes** of the Longshoremen's **Act.** The Supreme Court is now presented with an opportunity to clarify and resolve the inconsistencies created by the ambiguous language in the Act. By construing the Act as covering dockside injuries, the Court would make a substantial advance towards abolishing the **unrealistic distinction** between admiralty contract (status) jurisdiction and tort (situs) jurisdiction."

To turn our attention to *Rodrigue, supra*, it should be emphasized that the issue in this and its companion case was which of two federal statutes controlled, the Death on the High Seas Act or the Outer Continental Shelf Lands Act which adopted, in part, state law. Both lower courts held the Seas Act offered the exclusive remedy; this court reversed. In reaching its disposition, the Court had occasion to cite excerpts from the legislative history of the Act, particularly the authoritative remarks of Senators Gordon and Ellender. In the original draft it was sought to treat the "platforms or artificial islands created in the water as ships". This approach was abandoned and the bill was rewritten deleting entirely the reference to treating the islands as vessels.

In the course of his opinion, Mr. Justice White adverted to the fact that the Louisiana State law was far more liberal to the widows and children — a recognition of this court's continuing solicitude for dependents of workmen killed in the course of their employment — and alluded to the Admiralty Extension Act and *Gutierrez v. Waterman S. S. Corp.*, 373 U.S. 206, which, under the facts, were held not to be applicable.

In the instant cases, the maximum recovery of the widow and minor children under the Federal Statute is far in excess of that allowable on the state side, $63,000 vs. $15,000. Additionally, we do not have two federal statutes vying against one another; the choice is between a state and federal remedy. As has been developed in our original Brief, the existence of a state remedy does not — nay can not — oust the federal government of its authority to legislate in the maritime field. Traditionally, drilling for oil has been a land based activity; traditionally, piers have been indispensable adjuncts of navigable waters and ships.

Since the instant cases were argued in the spring, the American Law Institute released its "Study of the Division of Jurisdiction Between State and Federal Courts". Appendix G, pp. 505-507, sets forth the French Marine Ordinance of August 1681 and the Royal Declaration of 1694, interpretative thereof. Paragraph 10 reads:

> "They (the Admiralty Judges) shall equally have **jurisdiction** of piracies, spoliation and desertions of crews, and generally **of all** crimes and **wrongs committed upon** the sea, its ports, harbors and **beaches**."

The interpretative declaration reaffirmed the Ordinances of 1430, 1543 and 1681, all of which "assigned to the admiralty judges the **jurisdiction of all things whatsoever arising at sea and on the shores thereof**". The documents go on to declare that the admiralty judges shall have jurisdiction of civil matters "**including** those cases which may occur on the sea, the ports, harbors and beaches, and **upon the quays**, between all parties and private persons, without the said officers being troubled by our ordinary judges. . . ."

Some Further Observations on Legislative History

Because of the court's interest in the legislative history in *Rodrigue* and during the initial argument in the instant cases, some additional comments may be in order. This subject was touched upon in our original Brief, pages 13-18; see also (typed) Appellant's Supplemental Brief in the Court of Appeals, pages 2-15. Senator Cummins while chairing the meeting of April 2, 1926, in speaking in favor of uniform rates for the longshoreman, remarked:

> "We have exactly the same thing in the federal compensation law. We do **not make any distinction** there **in awarding compensation** to a federal employee, **determined by where he may be working** or where she may be working" (p. 46).

That Congress and the witnesses who appeared before it were desirous of making the coverage as comprehensive as possible is evident from this statement of Mr. O. G. Brown, a management attorney and a member of the balanced conference appointed to come up with a full coverage provision:

> "Just in passing, I want to say that we are very uncertain about that coverage; and while we have **tried to devise something** that, in our minds, would **make even more sure coverage** than that . . ." (p. 77).

Senate Report No. 973, previously cited in the Briefs of both parties also contains this sentence:

> "It thus appears that there is no way of giving to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without **enacting a uniform compensation statute.**"

On January 14, 1927, Congressman Graham submitted Report No. 1767 to the House. On page 19 he asserts:

> "The Senate bill as reported by the committee will provide the benefits of workmen's compensation to **practically all maritime workers within the admiralty jurisdiction.** Workmen's compensation has come to be universally recognized as a necessity in the interest of **social justice** between employer and employee . . ."

The "practically all maritime workers" reflects his concern over excepting seamen from the coverage of the bill which omission was in deference to the demands of Andrew Furusuth who attended the hearings on behalf of the seamen's unions. The co-author of the bill was apprehensive this absence would destroy the uniformity his committee was seeking and thus invalidate the act. In participating in the animated debate when the bill was con-

sidered by the House on March 2, 1927, Congressman Graham said:

> "Afterwards, when the Senate bill came to us, the question (seamen inclusion) was reopened and rediscussed, and under the dicta of the decisions of the Supreme Court it was felt that perhaps this very **bill might be imperiled if we did not have uniformity. That is what the judges have all cried for.** That is why they have declared unconstitutional in two cases acts of Congress attempting to give these laboring men compensation" (p. 5410).

At the argument on these cases this spring, the Court evinced an interest in the legislative history of the Admiralty Extension Act. As far as could be ascertained, there is no express reference to the Longshoremen's and Harbor Workers' Compensation Act therein. We do not deem this to have any particular relevance. This Court has held in several decisions that the views of a subsequent Congress or committee are not a part of the legislative of the Act under construction and are not a persuasive guide to the intent of the enacting Congress. *U. S. v. Philadelphia National Bank*, 374 U.S. 321, 348-349; *U. S. v. Wise*, 370 U.S. 405, 511, and *U. S. v. Price*, 361 U.S. 304.

Senate Report No. 1593, 80th Cong., 2d Sess., 1, 2 (1948) does, however, contain this pregnant quote:

> "For example, if a bridge or **pier,** or any **person** or property situated **thereon,** is **injured** by a vessel, the admiralty courts of the United States do not entertain the claim for the damages thus caused. . . . The **bill** under consideration **would provide for** the exercise of admiralty and maritime **jurisdiction in all cases** of the type **above indicated**."

What is the Common Sense of the Situation?

In addition to being factually upon navigable waters, piers are their indispensable adjuncts. There is a veritable

tidal wave of navigable waters in these cases. The Solicitor General in his brief makes such a factual concession. The *Johnson-Klosek* Libels contain an allegation the injuries occurred "upon the navigable waters"; this fact was admitted by the Answers of Nacirema Operating Co., Inc. In the *Avery* case there is an express stipulation the pier involved was upon navigable waters. Finally, one of the factual findings of Deputy Commissioner Traynor in the *Johnson and Klosek* cases was that the pier was upon navigable waters.

The cliche "a pier is an extension of the land" is as inaccurate factually as it is historically. Logically and functionally a pier is an extension of the ship — an oversized gangplank. A pier cannot be conceived of except in connection with navigable waters and a ship. Servicing a vessel — facilitating the loading or discharging — is its raison d'etre. In the words of *Johnson Co. v. Garrison*, 234 U.S. 251, 268, a 1914 decision, the **mooring of a vessel is as necessary as their movement.**"

The U. S. District Court for the Southern District of California came to the common-sense conclusion that a pier is an extension of the ship in the immigration case of *U. S. v. Yee Nee How*, 105 F. Supp. 517 (1952).

At the time our judicial system was established by the Constitution, the waters of the Patapsco River, Sparrows Point, Maryland, were navigable waters. The erection of the finger type pier probably sometime in this twentieth century did not destroy the navigability of these waters and did not diverst the federal government of its dominion thereover. As was pointed out in our original Brief, page 23, **"When once found to be navigable, a waterway remains so."**

When these cases were originally argued, one of the justices asked counsel for the Respondents whether a long-

shoreman struck by the ship's gear in a situation similar to that in the instant cases, but actually knocked into the water would be covered by the Act; counsel conceded he would. This question was followed up with a query about a longshoreman being struck on the ship by the same gear and knocked onto the pier; again counsel for the Respondents admitted this injury would be covered. In response to a third question, this counsel replied that the jurisdiction of admiralty could be extended to include a pier injury.

We must assume that questions of a similar nature occurred to the practical-minded Congressman. It is a well recognized principle that all injuries within the scope of the risk are within the legislative intent. Certaintly Congress, which was so concerned with "uniformity" didn't pass an act which gave the longshoreman only partial coverage and discriminated against the 25% of the gang which worked on the pier doing the same work, exposed to the same risks and receiving the same pay. As the Amicus Brief of the International Longshoremen's Association points out, the men shuttled back and forth in the course of their employment; this is even more true today with the emphasis on "roll on and roll off" cargo — a sort of automated return to the side hatch loading of Mr. Jensen's day.

Petitioners do not challenge the awarding of benefits to a longshoreman working on the pier who is lifted up and dropped back down on the pier, but demand their denial to his partner whose misfortune is to be knocked horizontally instead of being lifted vertically by something connected to the winch. Again, they would not complain about the granting of benefits to a harbor worker injured in a small boat under the pier involved in these cases; however, they strenuously object to the paying of an award to a longshoreman injured on the deck of the same pier.

The unsoundness of their contentions may appear in more convincing form in this hypothetical situation. The Classical Construction is engaged in Washington to erect a building. Some of its employees are working on the steel frame of the structure; others are down below on the adjacent sidewalk. A load of equipment being hoisted to an upper level breaks loose and falls. On the way down it strikes and kills an ironworker on the third floor; it continues its precipitous descent and kills a fellow ironworker performing his duties at that particular moment on the sidewalk. The employer and its carrier pay the widow of the employee killed while working on the third floor of the building, but balk about paying the same benefits to the widow of the co-worker crushed on the sidewalk maintaining she was restricted to lower compensation because her decedent was not in the building but on the adjacent sidewalk. This court would make a short shrift of such a groundless objection. If a compensation law did contain such a bizarre exclusion, it would probably be vulnerable to attack on the basis of a denial of the equal protection of the law.

The position contended for by the Petitioners in addition to being otherwise untenable, egregiously offends common sense. For the reasons developed in this Brief and the Briefs previously submitted in support of our position, we urge that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief were served on the following attorneys for all parties herein by mailing them, postage prepaid, on this 1st day of October, 1969:

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